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## DENE/METIS COMPREHENSIVE LAND CLAIM AGREEMENT IN PRINCIPLE

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DENE/METIS COMPREHENSIVE LAND  
CLAIM AGREEMENT IN PRINCIPLE

On 5 September 1988, Canada entered into an Agreement-in-Principle (AIP) with the Dene Nation and the Metis Association of the Northwest Territories to settle the land claims of the approximately 8,000 Dene and 5,000 Metis in that area. Although there were two early treaty agreements<sup>(1)</sup> in the Dene/Metis claim area, the land entitlement provisions of these treaties remain virtually unfulfilled and there is controversy about the validity of these documents as land cessions. The federal government agreed to negotiate the Dene claim in 1976 and the Metis claim in 1977 but later insisted on a joint settlement process. Although not under an immediate threat of a mega-development project, the Dene/Metis have felt considerable pressure to reach a settlement because of increasing development activities by private interests throughout the territory. As a result of a Final Agreement, the Dene/Metis hope to be in a position to benefit from and participate in that development while having clearly defined rights to harvest wildlife and other resources in the territory. This paper will highlight provisions of the Dene/Metis Agreement-in-Principle, and provide some brief commentary. It should be noted that some important issues, such as aboriginal self-government, await resolution through a Final Agreement (targeted for 1990) or elsewhere and that nothing in the Agreement-in-Principle imposes a legal obligation on either party.

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(1) Treaty No. 8 was signed in 1899 and Treaty No. 11 was signed in 1921. Metis scrip grants were also issued in these treaty areas.

## ELIGIBILITY TO PARTICIPATE IN SETTLEMENT BENEFITS (CHAPTER 4)

For both Dene and Metis, eligibility is generally based on Canadian citizenship, Dene descent (from the Chipewyan, Slavey, Loucheux, Dogrib, Hare or Cree people) and residence in the MacKenzie Basin on or before 1 January 1921, or descent from a person so qualified. It also grants eligibility to those adopted by law or custom, and to other aboriginal people who have been accepted by the community as Dene or Metis. The eligibility section notably omits any reference to Indian status under the Indian Act or specific blood quantum and avoids the technical problems in other Agreements that have used "ordinarily resident" criteria.

## EXTINCTION OF ABORIGINAL TITLE (SUBSECTION 3.1.9)

Current comprehensive claims policy does not require extinguishment of aboriginal title over settlement lands that are to be retained by aboriginal people. Nevertheless, this AIP provides for a very broad extinguishment clause; in some respects it is greater in scope than that used in the James Bay Agreement<sup>(2)</sup> because it includes waters and refers to claims anywhere within Canada rather than in the settlement area alone. The Dene/Metis are to "cede, release and surrender to Her Majesty in Right of Canada all their aboriginal claims, rights, titles and interest, if any, in and to lands and waters anywhere within Canada..." The use of the term "if any" instead of "whatever they may be" as used in previous settlements, seems intended to avoid any implicit recognition of aboriginal rights or title that could be constitutionally entrenched by virtue of subsection 35(3) of the Constitution Act 1982. The Dene/Metis also cede all claims and causes of action arising out of treaty or halfbreed scrip grants in respect to matters covered by the Final Agreement. The AIP nevertheless "recognizes... the historical and cultural importance of Treaties 8 and 11" (3.1.8).

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(2) The James Bay and Northern Quebec Agreement, 11 November 1975, settled the land claim of the Cree and Inuit

## NOTABLE GENERAL PROVISIONS

The AIP does not affect status under the Indian Act or eligibility for programs normally available to Indians or Metis or to citizens of Canada (3.1.4, 3.1.5).

The Dene/Metis purportedly waive the benefit of a line of case law in the Supreme Court of Canada which holds that doubtful language in agreements or statutes affecting aboriginal people should generally be resolved in favour of the aboriginal party (3.1.16).

All federal, territorial and local laws shall apply to Dene/Metis and their lands (3.1.18) but in the case of conflict with the Final Agreement or settlement legislation, the Agreement or settlement legislation will prevail (3.1.19).

## FINANCIAL COMPENSATION (CHAPTER 8)

Cash compensation will consist of \$453.3 million in 1988 dollars or at least \$500 million in 1990 dollars and will be paid over a period not exceeding 20 years. Federal loans granted to cover the negotiation costs of the aboriginal parties will be offset against this amount. Of the total cash compensation, \$75 million in 1985 dollars is to form a Dene/Metis Heritage Trust Fund (9.2.1 and 9.3.1).

## RESOURCE ROYALTIES (CHAPTER 10)

The sharing of royalty rights is a unique aspect of this settlement. The Dene/Metis will be entitled each year in perpetuity to 50% of the first \$2 million in resource royalties from the settlement area and 10% of any additional royalties. The only restriction on this right is that the government may limit payments to an amount, that if distributed to all participants in the settlement would equal the average Canadian per capita income.

## LAND (CHAPTER 21)

The AIP contemplates collective private ownership in fee simple by the Dene/Metis of 70,000 square miles. This ownership is largely restricted to surface rights except for 3,900 square miles that will include mines and minerals (21.1.1). However, the beds of water bodies within Dene/Metis lands are included (21.1.3). The land regime consists of:

- 1) Dene/Metis developed municipal lands - Dene/Metis real property within local government boundaries which is taxable when improved - apart from cabins and other structures used for traditional purposes (2.1.1 and 25.4.1);
- 2) Dene/Metis settlement lands - Dene/Metis lands outside local government boundaries granted under the agreement (2.1.1);
- 3) Dene/Metis lands - defined as Dene/Metis municipal lands and Dene/Metis settlement lands (2.1.1).

Dene/Metis settlement lands can be conveyed only to Dene/Metis organizations or to Canada in exchange for other lands (21.1.4). On the other hand, Dene/Metis municipal lands transferred to a Dene/Metis organization from Canada may be conveyed to a participant in the settlement or to any other person, but once so transferred they cease to be Dene/Metis lands (25.2.2, 25.2.3). Most notably, like a similar provision in the 1984 Inuvialuit Final Agreement, subsection 21.1.14 purports to deem Dene/Metis lands (municipal and settlement lands) not to be lands reserved for Indians within the meaning of the Constitution Act, 1867 or reserves within the meaning of the Indian Act. There is some question as to whether only a constitutional amendment could accomplish this result with respect to subsection 91(24) of the Constitution Act 1867. However, it could be argued that the AIP itself may effectively be considered a constitutional amendment pursuant to subsection 35(3) of the Constitution Act 1982. The AIP provides interim measures to protect Dene/Metis land once it has been selected and before the necessary implementing legislation has been adopted (21.3).

## TAXATION (CHAPTERS 11 AND 25.4)

The cash compensation and the first \$20 million in resource royalties will be tax exempt but income earned on these moneys will be subject to laws of general application. Under the Final Agreement, a Settlement Corporation will be established for activities to the general benefit of Dene/Metis (11.2). This entity will be subject to pay tax under Part XI of the Income Tax Act but will not be subject to the disbursement rules applicable to public foundations for the first 15 years (11.2.2).

Dene/Metis municipal lands and settlement lands are subject to taxation under laws of general application only if developed (25.4.1, 11.4.1, 11.4.2). The AIP states that Dene/Metis settlement lands shall not be seized or sold for taxes. It is silent on this point with respect to Dene/Metis municipal lands other than providing that where an occupant fails to pay real property taxes in respect to such lands, the Dene/Metis organization holding the lands will be liable to pay such taxes upon notice from the local government (25.4.2). Dene/Metis settlement lands leased or occupied by a non-participant are subject to real property taxation (11.4.3).

The section 87 Indian Act tax exemption for personal property (including income) situated on reserve continues to apply (11.5.1) but only to existing reserves (there are only two). This exemption will apparently not apply with respect to personal property on any Dene/Metis lands given that these lands are specifically deemed not to be reserves within the meaning of the Indian Act (21.1.14). In addition, the government reserves the right to repeal and amend section 87 of the Indian Act (11.5.4). This provision appears intended to avoid any possible constitutional entrenchment of this tax exemption through subsection 35(3) of the Constitution Act 1982.

## SAND AND GRAVEL (CHAPTER 24)

The Dene/Metis are obliged to provide supplies of, and access to: sand, clay, gravel and other construction materials on their

lands. They are entitled to fair and reasonable compensation. Where agreement cannot be reached on the terms and conditions of supply and access, these may be determined by the Land and Water Management Board.

## WATER (CHAPTER 27)

Dene/Metis rights to use water on or flowing through Dene/Metis lands are made subject to any legislation in respect of water use that is in force from time to time, and to uses authorized by law.

In particular, Dene/Metis rights to water of unaltered quality, quantity and rate of flow are subject to any legislation in force from time to time and the Dene/Metis are obliged to preserve the existing state of water on, flowing through or adjacent to their lands (27.1.6). A Dene/Metis right of action against any person for substantially altering such waters is expressly recognized but only for actions or use not authorized by law (27.1.7). The Land and Water Management Board may authorize such detrimental use where agreement on compensation has been reached with the Dene/Metis (27.2.1). Where agreement has not been reached, either party may refer the matter to the Board, which may authorize water use and determine the question of compensation (27.2.2).

## ACCESS RIGHTS AND EXPROPRIATION (CHAPTERS 22 AND 23)

Dene/Metis lands are subject to expropriation and extensive access rights by non-participants.

A general principle is stated in 22.1.2 that access to Dene/Metis lands will be allowed only with Dene/Metis consent. Chapter 22, however, provides for numerous exceptions to this general principle such as:

- 1) access to developed Dene/Metis municipal lands and to parcels of undeveloped Dene/Metis municipal lands less than four hectares will be determined only by laws of general application (22.1.3);

2) subject to certain restrictions, access rights are granted to the public (22.2), the government (22.3) and for commercial purposes (22.4).

Subject to legislation, public access to Dene/Metis lands includes rights to fish in navigable waters and to hunt migratory birds. During land selection, the parties are to determine where these rights shall be exercised. Members of the public may cross Dene/Metis lands to exercise a right on adjacent land or to go to and from work or a place of recreation (22.2.4). After the date of land withdrawal, third parties may continue to exercise existing access rights for commercial purposes (22.4.1) but any modification to such rights or the granting of new commercial access rights will be permitted only with Dene/Metis consent or if:

- 1) they are "of a casual and insignificant nature" or
- 2) they take place over a "recognized" route regularly used for such access or
- 3) they are permitted by the Surface Rights Board (22.4.2, 22.4.3).

As a general principle, Dene/Metis lands shall not be expropriated (23.1.1) but the powers of expropriating authorities are nevertheless preserved by 23.1.2. Where expropriation does occur, the expropriating authority is to negotiate with a Dene/Metis organization the location and amount of lands to be acquired and compensated for (23.1.4). "As a general principle," compensation is to be lands of equivalent significance and value in the settlement area (23.1.5) but if this is "not reasonably possible" or agreement is not possible, compensation will be money or some combination of land and money (23.1.6). In general, compensation may be determined through arbitration or the relevant statutory procedure if agreement is not possible (23.1.8, 23.1.9).

## ECONOMIC MEASURES (CHAPTER 12)

This chapter simply declares objectives for government economic development programs in the settlement area (essentially, Dene/Metis self-sufficiency and support of the traditional Dene/Metis economy) and specifies that these objectives do not impose any additional financial obligation on the government beyond the application of its programs as they may exist from time to time (12.1.4).

## WILDLIFE HARVESTING RIGHTS (CHAPTERS 13, 16, 17, 18 AND 20)

The Dene/Metis AIP provides for a number of special Dene/Metis hunting, fishing and trapping rights, such as:

- guaranteed minimum harvesting levels (when restrictions on harvesting are required for conservation purposes)
- exclusive rights to harvest fur bearers in the settlement area and all wildlife on Dene/Metis lands
- commercial harvesting rights
- rights of first refusal with respect to commercial guiding and outfitting activities
- rights to exchange, barter and sell or share edible wildlife products within the Dene/Metis community
- rights to sell or otherwise dispose of non-edible wildlife products to any person;
- access rights to land in the settlement area for wildlife harvesting purposes subject to certain restrictions including conflicting use;

- specified harvesting rights within National Parks and other protected areas;
- compensation for damages without proof of fault or negligence for losses relating to wildlife harvesting, caused by developers.
- special Dene/Metis harvesting areas for certain fish and species of wildlife may be established

These rights are subject to legislation enacted for reasons of conservation, public health or public safety and, subject to the terms of the Agreement, the government retains the ultimate jurisdiction for the management of wildlife and wildlife habitat. No rights of ownership in wildlife are conferred. Finally, outside Dene/Metis lands, access rights for harvesting purposes may be restricted when authorized uses of land in the settlement area conflict with the exercise of Dene/Metis harvesting rights.

## MANAGEMENT BOARDS

Like previous comprehensive claims settlements, the Dene/Metis AIP provides an opportunity for aboriginal people to participate jointly with government officials in regional management/advisory boards in the regulation of the use of land, water, animal resources, parks and the environment. The Dene/Metis will appoint half of the membership of the following entities to be created under the Final Agreement:

- ° Wildlife Management Board
- ° Park Management Boards
- ° Land and Water Management Board
- ° Environmental Impact Review Board
- ° Land Use Planning Board.

The AIP contemplates an integrated system of land and water management applying to the entire settlement area and forming part of a

larger system for the NWT (28.1.1). Among other things, implementing legislation will provide a means of monitoring cumulative impacts of land and water uses on the environment and for periodic environmental audits which will be made public (28.1.4).

The primary purpose of land use planning is stated to be the protection and promotion of the existing and future well-being of residents of the settlement area while having regard to the interests of all Canadians (28.2.4(a)).

All development proposals in the settlement area, including Dene/Metis lands, are subject to a environmental impact review process which may be initiated by a Dene/Metis organization or government authority (28.3.1, 28.3.4). Where implementing legislation does not determine whether a project should be reviewed, the first task of the Environmental Impact Review Board will be to make such a determination based on whether the proposed development is likely to have a significant impact on the environment and be a cause of significant public concern (28.3.5). Reviews may be conducted by the Board or some other body as determined by the Minister after receiving a recommendation from the Board (28.3.6, 28.3.7). The AIP contains few specifics of the standards for review but the reviewing body is to consider:

- (a) the protection of the existing and future economic, social and cultural well being of the residents and communities in the settlement area;
- (b) the protection of the environment from significant damage; and
- (c) in cases where a development proposal will likely result in a significant impact on the environment, the need for mitigative or remedial measures.

In general, the administrative bodies established by the AIP act as advisory bodies to the responsible federal Minister who may review, amend, alter or replace their decisions. The decisions of some Boards

(e.g. Land and Water Management Board) are also specifically stated to be subject to judicial review.

In addition, a Surface Rights Board will have the important function of settling disputes between Dene/Metis and others regarding access to Dene/Metis lands. The extent to which Dene/Metis organizations will be able to nominate members to this Board (if at all) has not been resolved and reportedly there is considerable concern in the Dene/Metis community about the ultimate jurisdiction and composition of this entity.

#### NATIONAL PARKS AND OTHER PROTECTED AREAS

The Dene/Metis have more restricted wildlife harvesting rights within national parks and other protected areas, which will be specified either in the Final Agreement or separate agreements. The Dene/Metis also acquire a variety of rights to be consulted and involved in the establishment and management of national parks in the settlement area and to have their interests considered. For example, before future parks are established in the settlement area, a Dene/Metis Impact and Benefit Plan will generally be required to be completed first and approved by the Minister (16.4). In addition, Dene/Metis will have equal representation with the federal government on a National Park Management Committee to be established for each national park in the settlement area (16.5.1, 16.5.2). These committees will advise the Minister on essentially all matters relating to park management (16.5.3). The AIP also specifies that:

"National parks will be managed in a manner which provides for wildlife harvesting by the Dene/Metis, consistent with the protection of wildlife habitat, the maintenance of viable wildlife populations, and the natural evolution of ecosystems and their associated plant and animal species, as well as public use and enjoyment of the national parks" (16.7.1).

The Dene/Metis will also have specified rights respecting the use of plants in such parks (e.g. 16.8.1) and measures are to be taken to encourage and train Dene/Metis for employment in national parks. The

AIP provides for the negotiation of an Agreement to deal with similar matters affecting Dene/Metis rights in territorial parks.

The AIP makes specific provisions for Dene/Metis rights in Wood Buffalo National Park (Chapter 18) and the consideration of their rights in the future establishment of Nahanni National Park (16.3.1) and a park in the area of the east arm of Great Slave Lake (Chapter 19).

#### **CONSULTATION ON EXPLOITATION OF SUBSURFACE RESOURCES (CHAPTER 31)**

Prior to opening any part of the settlement area to oil and gas exploration, the government is to notify the appropriate Dene/Metis organization and consider its views on the matter (31.1.1). Consultations are to take place between any developer and the Dene/Metis before the exercise of any exploration rights in respect to oil, gas or minerals (31.1.2 to 31.1.4).

#### **ARBITRATION (CHAPTER 6)**

The AIP provides for an Arbitration Board composed of nominees of Canada, the territorial government and the Dene/Metis, to resolve disputes submitted to it within the jurisdiction provided by the Agreement.

#### **IMPLEMENTATION PROVISIONS (CHAPTER 35)**

The government and aboriginal parties intend to negotiate an implementation plan covering

- costing of specific obligations
- manner of implementation
- identification of necessary legislative amendments.

## ABORIGINAL SELF-GOVERNMENT

Apart from the new entities anticipated by the AIP, such as management boards and local wildlife councils, local government will continue within the existing territorial legislative framework until agreement is reached otherwise (25.7.1, 3.1.24). The omission of self-government provisions is consistent with federal comprehensive claims policy which does not favour constitutional entrenchment of self-government through claims settlements. (This federal position was developed after the James Bay and Northern Quebec Agreement which contained provisions respecting local government.)

## CONCLUSION

The parties will now begin a land selection process and the negotiations for a Final Agreement targeted for 1990. The question of land selection and unresolved issues such as aboriginal self-government guarantees may be difficult obstacles to overcome on the path to this Final Agreement. Overall, the scope of rights recognized or granted to the aboriginal party is somewhat similar to that of the James Bay and Northern Quebec Agreement but with some important exceptions such as:

- 1) Dene/Metis rights to share in non-renewable resource royalties in perpetuity;
- 2) taxation of some Dene/Metis lands and loss of S.87 Indian Act tax exemption;
- 3) the grant of all Dene/Metis settlement lands in fee simple;
- 4) omission of provisions for Dene/Metis local government (may be negotiated later as a separate agreement);

- 5) ambiguous terms not necessarily to be interpreted in favour of the Dene/Metis party;
- 6) lack of income security program for traditional hunting, fishing and trapping pursuits.

Like previous settlements (in Northern Quebec and the Western Arctic) this settlement emphasizes the creation of new administrative structures and consultative mechanisms to balance the interests of aboriginal people with those of other territorial residents, corporate entities and the Canadian public in general. The question of political development in NWT is essentially avoided by providing that the AIP will not affect the process of devolution, the ability of Dene/Metis to negotiate self-government agreements in the future, or aboriginal rights that may be acquired through constitutional reform. While not blocking future developments in these areas, the Agreement is careful to preserve the status quo.

The general tenor of the AIP assumes continuing development in the North that may further diminish the traditional hunting economy. The AIP provides some minimum guarantees that for the foreseeable future a significant, though likely decreasing, portion of the aboriginal community will be able to continue to engage in traditional hunting, fishing, and trapping pursuits.







